REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No.: 6972/2001

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

and

MOTHIELALL SEEVNARAYAN **Respondent**

JUDGMENT: DELIVERED 3 JANUARY 2003

GRIESEL J:

1]This is an application by the National Director of Public Prosecutions (*NDPP*) for civil forfeiture, brought under sec 48(1) of the Prevention of Organised Crime Act (*POCA*), 121 of 1998 (*the Act*). A preservation order in terms of sec 38(2) of the Act was granted by DESAI J on 14 August 2001, preserving R3 202 455,83 invested with Sanlam Life Insurance Limited (*'Sanlam'*) in the name of Aboobaker Paruk (*'the Paruk investment'*), R913 282,75 invested with Sanlam in the name of Pat Oliver (*'the Oliver investment'*) and interest on those amounts, all of which comprised the proceeds of the repurchase of unit trust investments placed with Sanlam under the fictitious names of Paruk and Oliver. In addition, a curator *bonis* was appointed to assume control of the aforementioned property and to take it into his custody.

2]Pursuant to the aforementioned preservation order, the applicant now applies for an order declaring the property concerned forfeit to the State and for ancillary relief.

3]The respondent entered an appearance to oppose the application and in due course delivered answering affidavits. The applicant subsequently delivered supplementary affidavits, to which the respondent, by agreement between the parties, delivered supplementary answering affidavits, to which the applicant in due course replied.

4]Although voluminous papers have been filed on behalf of both sides, most of the material facts were eventually common cause and, as will appear below, they fall within a narrow ambit. However, before examining the facts in greater detail, it is necessary to refer briefly to the statutory framework of the present application.

Statutory Framework

5]The present application involves Chapter 6 of the Act, of which secs 48 and 50 form part, and which provides for *'civil forfeiture'*, as opposed to *'criminal forfeiture,'* which is, in turn, regulated by Chapter 5. The provisions of Chapter 6 may, in other words, be invoked even when there is no criminal prosecution of the individual or individuals concerned. The essential features of the Act, and more particularly of Chapter 6 thereof, have been examined in a number of recent judgments of our courts.1 It is, accordingly, unnecessary to repeat that exercise herein, save for the following few brief introductory remarks.

1 See eg *NDPP v Meyer* [1999] 4 All SA 263 (D) 272*h* – 276*g*; *NDPP v Carolus and others* 2000 (1) SA 1127 (SCA) paras [9] – [30]; *NDPP v Mohamed NO and others* 2002 (4) SA 843 (CC) paras [14] – [22]. See also A J Van der Walt *Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause* (2000) 16 SAJHR 1 at 34 *et seq*.

6]In addition to an introduction (*Part 1,* sec 37) and certain general provisions (*Part 4,* secs 58 —62), Chapter 6 is divided into two main parts: *Part 2* (secs 38 —47) provides for orders for the preservation and seizure of property as an interim measure pending an application for the forfeiture of such property. The purpose of such orders is to prevent property 'targeted' for forfeiture from being disposed of, removed or destroyed pending the determination of an application for its forfeiture. *Part 3* (secs 48 —57) provides for forfeiture orders, that is, orders for the forfeiture of property subject to preservation and seizure orders.

7]The Chapter provides for preservation, seizure and forfeiture of the following assets:

a) the ***'instrumentality of an offence referred to in Schedule 1'***.2 An *'instrumentality of an offence'* is defined as *'any property which is concerned in the commission or suspected commission of an offence…'*.3 Schedule 1 lists certain common law as well as statutory offences of a more serious nature, culminating in a catch-all provision in Item 33, targeting *'any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine';*

b) the ***'proceeds of unlawful activities'***,4 that is, *'any property or any*

2 secs 38(2)(*a*) and 50(1)(*a*).
3 sec 1(1), as substituted by sec 3(*b*) of Act 24 of 1999 and by sec 1(*a*) of Act 38 of 1999 *s.v.'instrumentality of an offence*'
4 secs 38(2)(*b*) and 50(1)(*b*)

> *service, advantage, benefit or reward which was derived, received or retained, directly or indirectly ... in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived'*.5 An ***'unlawful activity'***, in turn, means *'conduct which constitutes a crime or which contravenes any law ...'*.6

8]These mechanisms may only be invoked by order of the High Court. The proceedings under Chapter 6 are deemed to be civil proceedings governed by the rules of evidence and procedure applicable to proceedings of that kind.7 If a preservation order is in force, the NDPP may apply to the High Court for forfeiture of *'all or any of the property'*,8 which is what happened with the launching of the present application.

5 sec 1(1) as amended by sec 3(*c*) of Act 24 of 1999 and substituted by sec 1(*b*) of Act 38 of 1999 s.v. *'proceeds of unlawful activities'*
6 sec 1(1) as inserted by sec 1(*c*) of Act 38 of 1999 s.*v.* '*unlawful activity'*
7 sec 37
8 sec 48(1)

9]In terms of sec 50(1), the High Court *'shall'* grant the forfeiture order applied for by the NDPP if it finds on a balance of probabilities that the property is an instrumentality of an offence referred to in Schedule 1 or the proceeds of unlawful activities.

Factual Background

10]Turning to the facts, it appears from the evidence that the respondent is a businessman from Durban. He and his wife, to whom he is married in community of property, are the sole shareholders and directors of a furniture company, *Confurn Sales (Pty) Limited,* trading as *Imperial Furniture.* During the period 1993 to 1999 the respondent conducted numerous transactions with Sanlam at its Durban offices. In the main, his dealings were conducted through his broker, one Ashwin Singh (*Singh*), who is also his brother-in-law. Apart from various policies of insurance, he also made certain investments in Sanlam unit trusts.

11]The *Paruk* and *Oliver* investments, which form the subject matter of the present proceedings, were the last in a long series of rolling investments in Sanlam products, made under a variety of different names, mostly fictitious. The sequence of transactions was reconstructed and described as follows in the answering affidavits by one Dr W A A Gouws (*Gouws*), the respondent's tax advisor:

a) On 7 July 1994, an amount of R1 028 675,01 was paid from the account of the *N A Savings Club* at Nedbank, Mobeni Branch, Durban, to Sanlam for investment in unit trusts in the fictitious name of

N Singh ('the first investment'). (The respondent was the owner of the funds in the said account and at all relevant times had full control over such funds.) On 26 September 1994, the first investment was repurchased for R1 090 417,93 and the money was deposited at the ABC branch of the Standard Bank, Durban, into an account held at the New Republic Bank.

b) On 14 October 1994, a cheque for an amount of R1 094 689,98 drawn on that account in favour of *D Singh* was presented to Sanlam for the purposes of a unit trust investment in that name ('the second investment'). The name D Singh was also fictitious. On 26 March 1996, the second investment was repurchased for R1 337 634,25 and the money was deposited at the New Republic Bank in Durban in the name of D Singh.

c) On 8 April 1997, R990 000,77 of the proceeds of the second investment was used to make a third investment in Sanlam unit trusts in the fictitious name of *N Singh*.9 On 30 December 1997 the third investment was repurchased and R 995 946,12 of the proceeds was invested in a Sanlam policy in the name of *N Singh*.

d) On 6 January 1998, R1 million of the proceeds of the policy purchased with the third investment was used to make a fourth

9 The respondent does not explain what happened to the balance of R347 633,48.

investment in Sanlam unit trusts in the fictitious name of *S Singh*. On 31 March 1998, the fourth investment was repurchased for R1 447 618,86.

e) Also on 31 March 1998, R1 128 379,44 was paid to Sanlam (on the respondent's instructions) by way of a Trust Bank cheque to make an investment in Sanlam unit trusts in the fictitious name of *N Singh*. On 7 April 1998, the amount of R1 447 618,86, being the proceeds of the fourth investment, was used to make a further investment in Sanlam unit trusts, also in the name of *N Singh* (the 'fifth investment'). On 15 May 1998, the fifth investment was repurchased and an amount of R2 584 627,40 was paid into a Sanlam policy in the name of *N Singh*.

f) On 19 May 1998, R2 594 261,90 from this Sanlam policy was used to make a sixth investment in Sanlam unit trusts in the fictitious name of *A Singh*. Exactly a year later, on 19 May 1999, the sixth investment was repurchased for R2 719 642,28 and the proceeds were invested in a Sanlam policy in the name of *A Singh*.

g) On 26 May 1999, the Sanlam policy referred to in the preceding paragraph was paid out in the form of two cheques drawn in favour of A Singh, one for the sum of R1,4 million and the other for the sum of R1 317 642,28. The respondent handed these cheques to his attorney, one Yusuf Essack (*Essack*), who deposited them into accounts in the

name of A Singh at First National Bank and NBS Bank respectively.

h) On 23 July 1999, Essack obtained from NBS Bank a bank cheque for R1 319 642,28 payable to Sanlam, which on 29 July 1999 was used by Singh (the respondent's broker) to make an investment in Sanlam unit trusts in the fictitious name of *A Paruk*. On 11 September 1999, Essack obtained from First National Bank a bank cheque for R1,4 million payable to Sanlam, which on 13 September 1999 was used by Singh to make a further investment in Sanlam unit trusts in the fictitious name of *A Paruk*.

i) With regard to the *Oliver* investment, the respondent explained that during the early part of October 1999, he informed Singh that he had 'further funds', which he wished to invest with Sanlam in unit trusts. On 15 October 1999, he caused a cheque to be drawn in favour of Sanlam in the sum of R779 499,54. This was a bank cheque (the drawer being Nedbank) and was withdrawn from an account styled *Furnbea Savings Club*. He personally handed the aforesaid cheque, together with cash in the sum of R20 500,46, to Sanlam at its Durban branch. In the result, an investment in the sum of R800 000 was made on 22 October 1999 with Sanlam, ostensibly in the name of one *P Oliver*.

12]On 22 December 1999, apprehensive of the potential impact of the Y2K

phenomenon, the respondent instructed Singh to obtain repayment of the Paruk and Oliver investments from Sanlam. Singh instructed Sanlam to liquidate the investments and to pay the proceeds to Essack. Sanlam indicated, however, that it was not prepared to pay the money to Essack, but would pay Paruk and Oliver upon presentation of their identity documents.

13]In early January 2000, Essack wrote a letter to a Sanlam employee, stating that he (Essack) acted for Paruk and Oliver and that *'my clients require the full proceeds of their investments with your company to be paid into my trust account'*.

14]Also in early January 2000, Singh went to see one Fred Hohls, Sanlam's General Manager for KwaZulu-Natal, and told him that the respondent was the *'true investor'*. Hohls reported the matter to Eugene Louw (*Louw*) of Sanlam's forensic division.

15]On 11 January 2000, Singh made an affidavit in which he stated that he had created the fictitious names to *'protect [the respondent's] anonymity'*.

16]On 24 January 2000, Singh and the respondent attended a meeting at Sanlam's Bellville offices with, *inter alia*, Louw and Captain Wiehardt of the SAPS commercial crime unit. During this meeting Singh allegedly admitted that the money had been invested on behalf of the respondent under fictitious names in order to evade tax.

17]On 11 February 2000, Gouws and the respondent attended a further meeting at Sanlam's Bellville offices with, *inter alia*, Louw and representatives of the South African Revenue Service (*the SARS*). This meeting was followed by correspondence between Sanlam and Gouws, the upshot of which was that Sanlam declined to pay over the proceeds of the Paruk and Oliver investments to the respondent without an order of this court declaring that he was entitled to the money.

18]On 5 September 2000, the respondent accordingly instituted proceedings in this court against Sanlam (as First Respondent) and the Commissioner for the SARS (as Second Respondent) for an order that he be '*declared to be lawfully entitled to the funds presently invested with [Sanlam] under the investor names of A Paruk and P Oliver.*'

19]In the meanwhile, Gouws on behalf of the respondent had been negotiating with the SARS in connection with the respondent's liability to the SARS for additional tax. In this regard, an additional assessment in an amount of some R2,5 million was issued by the SARS during October 2000. This amount represents income tax, as well as additional tax and interest in respect of the amounts of income not declared by the respondent. On 29 March 2001 the SARS and the respondent reached agreement as to part of the respondent's tax liability in an amount of R817 369,75. It was further agreed that the dispute about the balance (R1 709 149,80) would in due course be resolved by the Special Income Tax Court.

20]This is how matters stood on 8 August 2001, when the present application was

launched, resulting in the granting of the aforementioned preservation order on 14 August 2001. It was subsequently agreed between Sanlam and the respondent that the Sanlam application would await the outcome of the present matter.

21]It appears, therefore, that the respondent is now faced by an onslaught on at least two fronts: in the present application, the applicant seeks forfeiture of the full investment of some R4,1 million, while the SARS are claiming additional tax amounting to some R2,5 million, irrespective of the outcome of the present application.

The Issues

22]In order to succeed in the present application, the applicant has to prove on a balance of probabilities —

a) that the property concerned is *'an instrumentality of an offence referred to in Schedule 1 to the Act',* as contemplated by sec 50(1)(*a*) of the Act*;*

b) alternatively, that the property concerned is the *'proceeds of unlawful activities',* as contemplated by sec 50(1)(*b*) of the Act.

23]The *'offences / unlawful activities'* on which the applicant relies are (a) fraud on the SARS; (b) contravention of sec 104(1) of the Income Tax Act; and (c) fraud on Sanlam. It was common cause during argument that all of these offences fall within

the ambit of Schedule 1 to the Act. I now turn to a discussion of these offences.

Fraud on the SARS and contravening the Income Tax Act

24]Although the respondent initially denied having perpetrated any fraud on the SARS, or having evaded income tax, and put up various exculpatory explanations as to the origin of the funds that ultimately became the Paruk and Oliver investments, it was eventually conceded in the heads of argument filed on behalf of the respondent herein that the monies in question had in fact been invested at the instance of the respondent under fictitious names with the motive of not disclosing such monies as income for purposes of taxation.

25]From the evidence as a whole it appears probable that Singh's *modus operandi* was designed to achieve two goals. The first – evidenced by the use of fictitious names – was to assist the respondent by obscuring the identity of the true owner of the funds in order to avoid the payment of income tax, both in respect of the amounts initially invested and on the taxable income earned from the investments. Singh's second goal – evidenced by the repetitive nature of the investments and the consequent payment to Singh of repeat commissions and Singh's qualifying for incentive prizes – was to be rewarded for facilitating the respondent's tax avoidance scheme.

26]On the evidence as a whole and for purposes of the present application, it must be accepted, therefore, that the respondent had indeed committed various contraventions of the provisions of sec 104(1) of the Income Tax Act insofar as it relates to his

personal income tax in respect of the tax years from 1995 to 1999. Furthermore, by submitting false returns in respect of these years to the SARS, the respondent had also committed a fraud on the SARS.

Fraud on Sanlam

27]The applicant avers further that the respondent had, in addition, committed a fraud on Sanlam which entailed Singh's making misrepresentations to Sanlam as to the identity of the Paruk and Oliver investors so as to (a) induce Sanlam to pay R22 480 for a skiing trip in Austria for Singh and his spouse, and (b) to preclude Sanlam from making proper returns and furnishing proper information and documents to the SARS.

28]As to (a), it appears from the evidence that, by virtue of the business generated by Singh, he was able to claim from Sanlam the incentive prize of an all-expenses-paid skiing trip to Austria, thereby allegedly causing Sanlam to act to its actual or potential detriment. By the time the fraud was discovered, Sanlam had actually announced that Singh had qualified for the incentive prize of the skiing trip to Austria and that he was the only broker in KwaZulu/Natal to have so qualified. The bookings were made by early December 1999, the cost to Sanlam being R22 480 for Singh and his spouse. Singh's trip was cancelled when, on 11 January 2000, Singh admitted to Hohls that the names Paruk and Oliver were fictitious.

29]The further actual or potential prejudice allegedly suffered by Sanlam arose from its inability to furnish to the SARS proper and accurate returns of dividends paid to

unit trust holders and taxable as interest because of the use by Singh of fictitious names, and, for the same reason, its inability (if called upon by the SARS) to furnish proper and correct information and documents relating to the investments in question. This second kind of prejudice is evidenced by consequent confusion of the SARS as to taxability immediately following the discovery of the fictitious investments.

30]It was denied on behalf of the respondent that any fraud involving Sanlam had been committed. Although this denial is not without merit, in the view that I take of the matter, it is not necessary for me to make any definite finding in this regard. I am prepared to accept in favour of the applicant, without deciding the matter, that the respondent's conduct vis-à-vis Sanlam amounted to fraud in one form or another.

An instrumentality of an offence

31]This clears the way for a consideration of the first issue mentioned above, viz whether the property concerned is an *'instrumentality of an offence'*. In this regard, it was submitted on behalf of the applicant that the Paruk and Oliver investments fell within the ambit of such definition, in the sense of being *'property which is concerned in the commission … of an offence'*.

32]The respondent contended, on the other hand, that the expression must be given a narrow interpretation. It was submitted in this regard that the words *'property which is concerned in the commission … of an offence'* in the definition of *'instrumentality of an offence'* in sec 1 denote '*a means by which the offence is committed*' e.g. a

truck used to convey protected game in contravention of a statute or provincial ordinance; not '*property in connection with which an offence is committed*' e.g. funds in a bank account in relation to the ownership of which a misrepresentation is made in circumstances not amounting to money-laundering.

33]Support for the respondent's interpretation is to be found in two recent decisions in this Division, viz *NDPP v Carolus*10 and *NDPP v Patterson.*11

34]In the *Carolus* case BLIGNAULT J considered the definition of *'instrumentality'* and the lack of clarity as to the meaning of the words *'which is concerned in'* in the definition. He stated the following in this regard:

> *'An instrumentality of an offence, according to the definition, means any property which is concerned in the commission or suspected commission of an offence. The meaning of the words "which is concerned" is not very clear. In the Afrikaans version of the Act the words "betrokke by" were used. That fits in with a meaning of "concerned in" in the sense of "involved in". To the extent that the meaning of the definition is vague, I am, in view of the far-reaching effect of the provisions of Chapter 6, of the view that a restrictive interpretation of this definition is called for.*
>
> *It seems to me, therefore, that a property would only qualify as an instrumentality where it has been used as a means or instrument in the commission of the offence, or where it is otherwise involved in the*

10 1999 (2) SACR 27 (C); also reported in [1999] 2 All SA 607. Confirmed on appeal by the SCA in *NDPP v Carolus* 2000 (1) SA 1127 (SCA)
11 [2001] 4 All SA 525 (C)

commission of the offence.' 12

35]In the *Patterson* matter FOXCROFT J referred with approval to the aforementioned judgment and stated the following with regard to the definition of *'instrumentality'* of an offence:

> *'The phrase "instrumentality of an offence" is at first sight somewhat clumsy, particularly when one has regard to the definition section which defines it as "any property which is concerned in the commission or suspected commission of an offence." This apparent clumsiness is only because the word "instrumentality" normally means an agency or means of doing something, and would not normally be used to describe something like property. …When one reads the closing paragraphs of the preamble to the Act, the meaning becomes clear.… It is clear, therefore, that the word "instrumentality" was used in its ordinary English meaning as a means by which the offence is committed.'13 (my emphasis)*

36]Counsel have not attempted to persuade me that the interpretation adopted in these two cases was palpably wrong, nor am I so persuaded; on the contrary, I am satisfied that such interpretation is clearly correct and therefore binding on me. The above interpretation is furthermore in line with the Afrikaans version of *'instrumentality of an offence'*, viz *'misdaadsinstrument'*. It is further supported by the reference in the long title of the Act, where the aim of the statute is stated to be *inter alia* to provide for *'the civil forfeiture of criminal assets that have been used to*

12 at 39*g —j ;* 618*g —h*
13 at 527*b —d*

commit an offence'.

37]This raises the question whether or not the property in question can properly be described as the means by which the offences were committed. I think not. Adopting the aforementioned interpretation, as I am bound to do, it would, in my view, be straining the language of the Act unduly and, moreover, be contrary to the purpose of the Act if one were to describe the property in question, viz the investments of some R4 million with Sanlam, as the means by which the alleged offences of fraud and contravention of sec 104 of the Income Tax Act were committed. After all, fraud is not committed by means of money or other property, but by means of intentional misrepresentations. Likewise, tax evasion in contravention of sec 104 of the Income Tax Act is not committed by means of undeclared income —the undeclared income forms the subject matter of the offence.

38]If the wide interpretation of *'instrumentality',* as proposed by the applicant were to be adopted, it could well result in the unconstitutionality of the provision in question, as was argued on behalf of the respondent. It is not, however, necessary for me to engage any further with the constitutional arguments raised in this regard. Apart from the fact that the interpretation propounded on behalf of the respondent is supported by direct and binding authority, I am satisfied that such interpretation is also called for in view of the approach laid down by the Constitutional Court to the effect that, where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a

court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.14

39]I conclude, therefore, as far as this aspect is concerned, that the applicant has failed to discharge the onus of proving, on a balance of probabilities, that the property concerned was an instrumentality of an offence, as contemplated by the Act. In the circumstances, the constitutional point raised on behalf of the respondent does not arise.

The Proceeds of Unlawful Activities

40]I now turn to consider the next crucial issue, namely whether or not the applicant has proved on a balance of probabilities *'that the property concerned … is the proceeds of unlawful activities'*.

41]Although strong criticism has been levelled at the respondent for his failure adequately to explain the source and origin of the funds in question, the applicant, on whom the onus rests, has not attempted to prove that the property concerned represents ill-gotten gains derived from the kind of unlawful activities normally associated with 'organised' crime, e.g. drug smuggling, gunrunning, bank robbery, or whatever. It must therefore be accepted for purposes of the present enquiry (a) that the only *'unlawful activities'* that are in issue are the above-mentioned frauds on the SARS and Sanlam, as well as the contravention of sec 104(1) of the Income Tax Act;

14 *De Beer NO v North-Central Local Council and South-Central Local Council and others (Umhlatuzana Civic Association intervening)* 2002 (1) SA 429 (CC) 443E —F par [24] and authorities referred to in footnote 26. See also *NDPP v Mohamed NO and others,* n1 above, at par [33] and authorities referred to in footnote 19.

and (b) that the funds in question constitute undeclared income derived from legitimate sources; in other words, that the respondent had legitimately earned that money. What he had failed to do, was to declare such income to the SARS and to pay the income tax that was due, as he was obliged to do. Instead, he submitted false returns to the SARS, omitting any reference to such income or to the existence of the investments derived from such income.

42]In terms of sec 48(1), as I have indicated above,15 the NDPP *'may'* apply to a High Court for an order forfeiting to the State *'all or any of the property that is subject to the preservation of property order'*. The *'property'* in the present context refers, of course, to the total proceeds of what used to be the Paruk and Oliver investments, i.e. an amount of some R4,1 million, together with accrued interest. In *casu* the applicant has seen fit to apply for the forfeiture of *'all'* such property. He must, therefore, discharge the onus of proving that *'all'* such property is the proceeds of unlawful activities. It is important to note in this regard that the court has no power in terms of sec 50(1) to 'pare down' the order asked for. I shall return to this aspect in more detail below.16

43]Can it be found in these circumstances that *'(all) the property concerned'* is the proceeds of the unlawful activities relied upon by the applicant in the instant case? Counsel for the applicant submitted in this regard, with reference to the definitions of '*proceeds of unlawful activities*' and '*unlawful activity*' in sec 1 of the Act,17 that,

15 par [8] above
16 par [49] below
17 par [7] above

subsequent to the commission of the frauds on the SARS and on Sanlam, (as set out above), the funds became the proceeds of the frauds, in the sense that it was then *'property derived, received or retained …in connection with or as a result of any unlawful activity'*.

44]Although the definition in question is *'about as wide as can be',*[18] I cannot accept this argument. The fallacy, to my mind, is that it loses sight of the fact, as I have accepted above, that the *'property concerned'* had been legitimately *'derived (or) received'* by the respondent. On the facts before me, he did not go out and steal it, nor did he obtain it by means of fraud or any other unlawful activity. It cannot therefore be regarded as *'property derived (or) received'* from unlawful activities, for the simple reason that the property was *'derived (or) received'* before any unlawful activity had taken place.

45]In the *Carolus* matter[19] BLIGNAULT J held as follows with regard to the *'proceeds of unlawful activities'* in the context of sec 38(2)(*b*) of the Act:

> *'In order to be able to rely on subpara (b), that is the "proceeds of unlawful activities", it is clear that the applicant must establish a connection or link between the alleged unlawful activity and the property concerned. In terms of the definition there must be evidence that the property was derived, received or retained, directly or indirectly, in connection with or as a result of the unlawful activity carried out by any person.'*

18 *NDPP v Meyer* n 1 above at 276*d*
19 n 10 above at 39*c*

Van der Walt20 makes the same point, stating thus:

> *'There should, consequently, be a reasonable connection between blameworthiness for a crime and the property that is forfeited; if not, the forfeiture should be open to constitutional review.'*

46]For the reasons set out above, I am of the view that the applicant has failed to establish a connection or link between the alleged unlawful activity and the derivation or receipt of the property concerned.

47]This raises the further question as to whether it can perhaps be said that the property concerned was *'retained … as a result of any unlawful activity'* (my emphasis). Bearing in mind that the property represents undeclared income and the growth thereon (in the form of *inter alia* interest) , it must follow, in my view, that the *'property … retained'* as a result of unlawful activity can only refer to that portion of the property that would otherwise (i.e. had no unlawful activity taken place) have been subject to income tax. If this is so, then, at best for the applicant, only some 40% of the property concerned could conceivably represent *'proceeds'* of the *'unlawful activity'* in question. Even if the respondent had committed none of the unlawful activity in question, he would have been able (legitimately) to retain and utilise the balance of the property concerned. This being so, the NDPP was not, in my view, entitled to apply for, nor the court to grant, forfeiture of *'all'* the property concerned.

---

20 n 1 above at 37

48]It is important to bear in mind in this regard, as I have indicated above,21 that the court does not, in terms of sec 50(1) of the Act, have a discretion to 'pare down' the order asked for by the NDPP by issuing a partial forfeiture order. Significantly, the NDPP, on the other hand, does have a discretion, in terms of sec 48(1), to apply for partial forfeiture only (*'all or any of the property'*). The fact that the applicant in the present application is seeking forfeiture of *'all of the property'*, leads ineluctably to the conclusion that it involves a choice between all or nothing. I have concluded that the applicant is not entitled to *'all'*. It follows, therefore, that in these proceedings it is not entitled to anything.

49]The situation in this respect is (to a certain extent) similar to that in *Carolus's* case,22 where it was held:

> *'Even if it is assumed that respondent derived some income from dealing in drugs, then, given the fact that applicant is not able to dispute respondent's averments about his lawful activities and the other legitimate ways in which he and his family earned income over the relevant period, it seems to me that in this case it is practically impossible to come to a belief that any of the properties were derived, received or obtained [sic — retained] from the alleged unlawful activity, and not perhaps from other activities.'*

21 par [43]
22 n 10 above at 39*d* —*e*; 618*d* —*f*

50]In the circumstances, I conclude that the applicant has not discharged the onus of proving on a balance of probabilities that the property which forms the subject of the current application (i.e. the total proceeds of what used to be the Paruk and Oliver investments) is the *'proceeds of unlawful activities'*.

51]However, if I were to err in coming to this conclusion, I am of the view that the application cannot, in any event, succeed. Having regard to the very wide definition of *'proceeds of unlawful activities'*,23 it could lead to absurd and grossly inequitable consequences unless a restrictive interpretation were applied to the provisions in question. The present case may serve as an example. As pointed out above,24 the applicant claims forfeiture of the full amount of some R4,1 million in terms of sec 48(1) of the Act, arising from the unlawful activities referred to above. In addition, the SARS claims to be entitled to additional tax, amounting to some R2,5 million, arising from the same unlawful activities. Moreover, the SAPS are investigating fraud charges against the respondent. Should the respondent be charged and convicted (which, on the available evidence, does not seem improbable), he may be exposed to further punishment by way of fines, with or without imprisonment. (I leave out of the reckoning, for present purposes, the possibility of a civil claim for damages by Sanlam, arising from the fraud allegedly committed against it.)

52]A further complication that arises in the present case relates to the fact that the respondent and his wife are married in community of property. She must, therefore,

23 see par [7] above
24 par [21]

be regarded as the owner of an undivided one-half share in the property concerned. There has been no suggestion that she had been a party to the alleged unlawful activities. In fact, she has not even been joined as a party to this application. Even although this fact, by itself, would, in view of the provisions of sec 50(3) of the Act, probably not preclude the court from granting a forfeiture order affecting her, I take into account, nonetheless, that this is a further aspect adding to the harshness of a possible forfeiture order herein.

53]The cumulative effect of all these potential sanctions is, in my considered opinion, totally disproportionate to the nature and extent of the *'unlawful activities'* in question. Such a result could not have been intended by Parliament.

54]The obvious way in which to avoid such potentially disproportionate and inequitable results would be to grant to the courts the power to submit an application for forfeiture to *'proportionality review'*.25 The present Act, however, does not make provision for a proportionality test of any kind, nor does the court in terms of sec 50(1) have any discretion in the matter. Counsel were agreed in this regard that the word *'shall'* in this context denotes a mandatory forfeiture and cannot be read as *'may'*.

55]After the conclusion of argument before me, I raised the question with counsel whether the provisions of sec 50(2) of the Act might not be employed so as to ameliorate to some extent the potentially harsh consequences of a literal application

25 Compare in this regard the very useful article by A J van der Walt (n 1 above), especially at 35 *et seq*

of sec 50(1). Sec 50(2) provides as follows:

> *'The High Court may, when it makes a forfeiture order or at any time thereafter, make any ancillary orders that it considers appropriate, including orders for and with respect to facilitating the transfer to the State of property forfeited to the State under such order.'*

More particularly, I asked counsel whether it would be possible, should a forfeiture order be issued, for the court to order in terms of this sub-section that portion of the money so forfeited be paid by the curator to the SARS in satisfaction of the respondent's tax liability, once same has been determined.

56]For reasons that need not presently be spelt out in detail, counsel, in their supplementary written submissions, were *ad idem* that this would not be a permissible approach. I accept, therefore, that it is not competent to order that the respondent's indebtedness to the SARS be satisfied from any amount that may be declared forfeited to the State in terms of sec 50(1).

57]The only means, in my view, to avoid the potentially disproportionate results of a forfeiture order in the present instance, is to apply a restrictive interpretation to the statutory provisions in question. In my view, the key to such a restrictive approach is to be found in the provisions of the short title, the long title as well as the preamble to the Act.

58]It was submitted on behalf of the applicant that it was not permissible to have

regard to the preamble unless the provisions of the Act are ambiguous. Reliance was placed in this context on cases such as *R v Associated Trade Supplies Ltd and Another;*26 *Jaga v Dönges NO;*27 and *Green v Minister of the Interior*.28 In my view, however, this represents an antiquated approach to the process of statutory interpretation. As pointed out by Du Plessis,29

> *'One issue in respect of which the law of statutory interpretation as it stands today differs most markedly from the law as it stood prior to 27 April 1994 is the admissibility and manner of invoking preambles as interpretive aids. …The more unqualified use of preambles in constitutional interpretation has met with response in statutory interpretation too. …Generally speaking courts other than the Constitutional court, namely the Supreme Court of Appeal and high courts, have shown a readiness to invoke preambles to legislative instruments irrespective of the perceived clarity and/or ambiguity of the language of individual provisions that stand to be construed.'*

59]The short title of the Act already holds a clue as to the mischief aimed at by the Legislature: it is directed at the prevention of *'organised'* crime. Not by the wildest stretch of the imagination could the evasion of personal income tax by a single individual be categorised as *'organised crime',* even where it may have been perpetrated over a few successive tax years.

60]This conclusion is reinforced when regard is had to the long title: the Act is

26 1945 AD 611 at 615
27 1950 (4) SA 653 (A) 664H
28 1968 (4) SA 321 (A) 327C-D
29 LAWSA Vol 25 Part 1 (first reissue) par 349 (footnotes omitted); see also Du Plessis *Re-Interpretation of Statutes* (2002) 239 – 244

intended to combat *'organised crime, money laundering and criminal gang activities'*. This triad of social evils forms a recurrent theme throughout the Act. Although it was submitted somewhat tentatively on behalf of the applicant that the respondent's conduct with regard to the rolling investments described above *'amounts to money-laundering, or at least closely resembles money-laundering'*, this was not the basis on which the application has been presented. I am in any event satisfied that the unlawful activities in question fall outside the ambit of the above categorisation.

61]With reference to the preamble, one reads *inter alia* the following:

> *'…And whereas there is a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally and since organised crime has internationally been identified as an international security threat;*
>
> *…And whereas the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities; …'*

These, as well as other statements in the preamble in similar vein, convey the clear impression that the Act was never intended to be applied in situations such as the present. Not only is there no apparent trace of *'organised crime, money laundering and criminal gang activities'* in the present scenario; but tax evasion and tax fraud is one area where South African statutory law actually does manage to deal quite

'effectively' with offenders through elaborate provisions and severe penalties in the Income Tax Act.30

62]In any event, as I have tried to show above, a literal application of the definition of *'proceeds of unlawful activities'* to the facts of the present matter would lead to absurd and grossly inequitable results. In these circumstances, the court would be entitled – even on the 'traditional' approach, as advocated on behalf of the applicant – to have regard to the preamble, leading to the same conclusion, namely that the present Act was not intended to be applied in a situation such as the present.

63]I accordingly conclude that, upon a proper construction of the Act, the property concerned does not constitute the proceeds of unlawful activities. This conclusion should not, in my view, cause any undue hardship to the applicant. It is still open to it, if so advised, to prosecute the respondent and, upon conviction, to invoke the provisions of sec 18 of the Act in relation to 'confiscation orders', in which event the court may exercise a discretion, having regard to all relevant considerations. In that way, the applicant can effectively get a 'second bite at the cherry'.

Concluding remarks

64]Having come to the aforementioned conclusion, it follows that the present application cannot succeed. In view of the arguments addressed to me on behalf of the applicant, I feel duty-bound nonetheless to record certain reservations regarding

30 Compare in this regard the case of *NDPP v Mohamed NO* n1 above, where the Constitutional Court, at paras [14] and [15], specifically referred to the preamble to the Act presently under consideration.

the particular statutory provisions in question. Counsel for the applicant submitted in their written heads of argument *'that s 50(1) of the Act contains the significant safeguard that a forfeiture order may only be made by a High Court – as distinct from, say, an administrative agency – and then only if it finds on the probabilities that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities'*.

65]In my view, this is cold comfort indeed. The fact of the matter is that the NDPP is given a wide and untrammelled discretion to decide whether or not to apply for a seizure order, a preservation order, or a forfeiture order, whether in whole or in part. The High Court, by contrast, does not enjoy a similar discretion. Once the jurisdictional facts have been established, the court *'shall'* make an order. Indeed, the role of the High Court in the context of sec 50(1) of the Act has been reduced to little more than a rubber-stamp. Nothing argued to the contrary on behalf of the applicant has persuaded me that these provisions, as they stand at the moment, were introduced with any other motive than to lend a façade of respectability to a process of civil forfeiture controlled by the prosecuting authorities.

66]The complete absence of any discretion of the High Court in terms of sec 50(1) of the Act may be contrasted with the provisions of Chapter 5 of the same Act, where the court is in fact granted some discretion in relation to *'confiscation orders'* (sec 18) and *'restraint orders'* (secs 25 and 26). Given my conclusion with regard to the court's inability to grant a partial forfeiture order, it is interesting to compare, for example, the provisions of sec 18(2)(*a*), whereby the court is given a discretion to

order a 'defendant' to pay to the State an amount *'as determined by the court in accordance with the provisions of this Chapter'*. It is ironic that the court should have such discretionary powers in the context of criminal forfeiture (more particularly, sec 18) where the guilt of a 'defendant' has already been proved beyond reasonable doubt,[31] while not having any discretion in a situation where no prosecution has taken place or is even pending.

67]A further defect in this regard that was pointed out on behalf of the respondent refers to the fact that the Act lays down no guidelines for the exercise of such discretion by the NDPP or his delegates. In *Dawood, Shalabi and Thomas v Minister of Home Affairs and others*[32] the Constitutional Court said the following, with reference to the discretion conferred upon certain officials in terms of the Aliens Control Act, 96 of 1991:

> *'There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provision of the Bill of Rights.'*

68]In attempting to distinguish *Dawood's* case from the present one, counsel for the applicant submitted that the situation with regard to the NDPP was vastly different.

31 Compare *NDPP v Mohamed NO* n1 above paras [16] and [17]
32 2000 (3) SA 936 (CC) par [46] at 966D

After all, so the argument went, the NDPP is a very senior public official, who, by definition, is a legally trained person. The NDPP, like all other organs of state, is bound to respect, protect and promote the Constitution, including the rights in the Bill of Rights.33 Moreover, his power must be exercised subject to the constitutional principle of legality as well as the minimum threshold that all exercises of public power be rational.34 In any event, so it was submitted, there is no warrant for assuming that the applicant would abuse his discretion. After all, in the words of counsel, *'someone has to be trusted'*; the unexpressed implication being that the *'someone'* should be the NDPP.

69]Lord Denning proposed a different solution to the same dilemma. In a famous aphorism, he put it thus: *'Someone must be trusted. Let it be the Judges.'* 35 This ought to be so, according to the learned author, because *'(t)he judges are the guardians of our Constitution here, just as they are in the United States'*.36

70]I unhesitatingly prefer the approach proposed by Lord Denning. Against the foregoing background, it is disquieting to note that, in a young democracy such as ours, Parliament has seen fit to entrust an untrammelled discretion to the nation's chief prosecutor (and his delegates) to exercise the wide and sweeping powers contained in Chapter 6 of the Act under consideration, while withholding it from the

33 secs 2 and 7(2) of the Constitution
34 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) par 56-59; *Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) par 17; *South Africa Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) par 20 and 63
35 *What Next in the Law* (Butterworths, 1982) 330
36 *ibid* 318

judges. Again, I draw attention to the contrast with Chapter 5 of the Act. One can only express the hope that this obvious defect in Chapter 6 will be remedied by Parliament by returning to the High Court the discretion that it presently lacks in this regard.

Conclusion

71]Before concluding this judgment, I wish to express my appreciation and pay tribute to counsel on both sides for the very full and helpful heads of argument, as well as supplementary heads of argument, submitted by them in this matter. This was followed by oral arguments of the same standard. It represented advocacy of the highest order, which assisted the court enormously in its task.

72]For the reasons set out above, I conclude, therefore, that the applicant is not entitled to the order which it seeks. **It is accordingly ordered that the application be dismissed with costs, such costs to include the costs of two counsel.**

73]

74]B M GRIESEL
JUDGE

2]